Docket Nos. 1-08-2055, 1-08-2056, 1-08-2189, 1-08-2304, 1-08-2451, 1-08-2452 and 1-08-2453 (cons.)

IN THE ILLINOIS APPELLATE COURT
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS *ex rel.* **LISA MADIGAN, ATTORNEY GENERAL OF STATE OF ILLINOIS, ET AL.** *Petitioners* v. **ILLINOIS COMMERCE COMMISSION, ET AL.** *Respondents*	On Direct Appeal of Orders of the Illinois Commerce Commission Ill.C.C. Docket Nos. 07-0241and 07-0242 (cons.)

POINTS AND AUTHORITIES

* Designation "A#" indicates document (or relevant portion) is contained in Separate Appendix of the Commission

ARGUMENT

I. GENERAL ISSUES

A. Jurisdiction

Although North Shore Gas Co. and Peoples Gas Light & Coke Co. ("the Utilities") are not pursuing the jurisdictional issue (Brief, pp. 7-8), the Illinois Commerce Commission ("Commission") must pursue the matter as the only necessary Respondent to all appeals from the Commission. 220 ILCS 5/10-203. The present cause is the first and only case in which consolidation of the appeals, as provided by the statute, has not gone to the first Appellate Court to have received the first appeal in time. 220 ILCS 5/10-201(a). Technically, because the Illinois Appellate Court for the Second District transferred all appeals to First District on its own Motion, the People of the State of Illinois' (" the People's") Motion to Dismiss the still pending first appeals and the Responses of the Commission and the Utilities are still pending unresolved. *North Shore Gas Co, et al. v. Illinois Commerce Commission,* Appeal Nos. 2-08-0364, 2-08-0839, 2-08-0390 and 2-08-0713, Order of August 26, 2008, Commission's Separate Appendix ("Comm. App."), p. A1.

The Commission granted a partial rehearing in this case (R. Vol. 87, C21239-21240). During the pendency of the rehearing, three parties (the Utilities, Abbott Laboratories, Inc., and the People) filed appeals in the Second District (R. Vol. 88, C21421-21449, C21456-21465, and C21477-21504). After issuance of the Order on Rehearing, the Utilities again filed in the Second District, but the People filed in the First District (R. Vol. 89, C21603-21631 and C21632-21652). The People's second filing preceded the Utilities' second filing to the Court, although the Utilities claim in

their Response to be the first to have complied both with the statute and Supreme Court Rule 335. Subsequently, Abbot Laboratories, Inc., voluntarily dismissed all three of its appeals, including the first one.

1. The right to appeal to the Appellate Court during the pendency of rehearing at the Commission: various rulings in this century

In 2001, the Illinois Supreme Court issued a supervisory order to the Second District to reinstate an appeal by Commonwealth Edison Company which had been taken during the pendency of a granted rehearing and had been dismissed as premature. *Commonwealth Edison Co. v. Illinois Commerce Commission,* 332 Ill. App. 3d 1038, 1046-7 (2nd Dist., 2002) *citing* 195 Ill.2d 576 (2001). The Appellate Court in its final opinion did not further address the jurisdictional aspects of the appeals. To the Commission's knowledge, this was the first case in which an appeal taken during the pendency of a Commission rehearing had been allowed.

In 2006, the Illinois Supreme Court issued a supervisory order consolidating all appeals in the Second District, the first District to receive an appeal of a subsequent appeal of a Commission order involving ComEd. *Commonwealth Edison Co. v. Illinois Commerce Commission,* 368 Ill. App. 3d 734, 735 (2nd Dist., 2006). Thereafter, the Second District held that the first appeal to the Second District and the only appeal to the Fourth District were premature and subject to dismissal because Supreme Court Rule 303(a) did not allow for appeals while *applications* for the rehearing had not yet been denied (368 Ill. App. 3d at 739-740). 220 ILCS 5/10-113(a) [applications for rehearing are denied by operation of law after 20 days for purposes of appeal unless granted by the Commission]. Technically, the appeals in 2006 were not taken during the pendency of rehearing (368 Ill. App. 3d at 736), and the finality of the Commission

order of January 24, 2006, was never subject to further order of the Commission. *People ex rel. Madigan v. Illinois Commerce Commission, et al.,* 231 Ill. 2d 370, 375-9 (2008) [Court looks to Commission declaration of finality in an order] and *Black Hawk Transit Co. v. Illinois Commerce Commission,* 398 Ill. 542, 558 (1948) [Commission order becomes final at the time of entry].

This *Commonwealth Edison* decision, however, conflicts with the Supreme Court's Order in that case to consolidate in the Second District and is contrary to the aforecited 2001 order of the Supreme Court. Although the Court recognized that it was questioning its own jurisdiction under the statute (368 Ill. App. 3d at 744), the case was later dismissed voluntarily with no decision on the merits. There were also two dismissals in the Fourth District in 2006 by Court order which may have been on similar grounds. *People ex rel. Madigan v. Ill. Commerce Commission,* 231 Ill. 2d 370, 376 (2008) [two AT&T appeals dismissed as premature; no rehearing had been granted so the finality of the Commission order was never altered]. *See also People ex rel. Madigan, supra,* 231 Ill. 2d at 375-9 and *Black Hawk Transit Co., supra,* 398 Ill. at 558, concerning finality of a Commission order.

In the recent 2008 Commonwealth Edison appeals from Ill.C.C. Docket No. 07-0566 (Appeal Nos. 2-08-0959, 2-08-1037, 2-08-1137, 1-08-3008, 1-08-3030, 1-08-3054, and 1-08-3313) wherein once again there was a granted rehearing, the first of Commonwealth Edison's appeals (Appeal No. 2-08-0959) was filed during the pendency of rehearing. The Supreme Court once again consolidated in the Appellate Court in which the first appeal was filed, the Second District. *Commonwealth Edison*

Co v. People ex rel Madigan, Docket No. 107694, Supervisory Order of January 15, 2009, Comm. App., pp. A2-A3. ComEd's first appeal has not been dismissed.

2. Only the Illinois Appellate Court for the Second District has jurisdiction to hear these appeals under the statute

When the first three appeals were filed in the Second District herein, the appeals were held by the Second District. Presumably this was in compliance with current Supreme Court Rule 303 which no longer requires dismissal of premature appeals from final orders. The Second District's transfer, however, is inconsistent with current Supreme Court Rule 303(a)(2) which provides that the premature appeals from final orders become effective upon the issuance of the final order on rehearing (as in this case). These premature but now effective appeals were filed before the second appeals of the Utilities and the People were filed. *Compare* R. Vol. 89, C21595 *with* C21603 and C21632 or *See* R. Vol. 1, Index, p. 41. Thus, Supreme Court Rule 303 would provide the Second District with first jurisdiction over the present appeals to the exclusion of the First District if 220 ILCS 5/10-201(a) is to be strictly complied with.

The transfer is also inconsistent with recent decisions which provide that under current Supreme Court 303, if the appeal is without jurisdiction, the appeal is to be dismissed and not transferred. *First Bank v. Phillips*, 379 Ill. App. 3d 186, 188 (2nd Dist., 2008) [untimely appeal under current Supreme Court Rule 303 does not constitute an appeal to the wrong court under Supreme Court Rule 365) and *Swinkle v. Ill. Civil Service Commission*, 2009 Ill. App. LEXIS 12, *10-*12 (4th Dist., 2009), Docket No. 4-08-0314, Opinion issued 1/15/09, pp.9-10 [same], Comm. App., pp. A12-A13. If the Second District was of the opinion that the three held appeals were premature and without jurisdiction, the proper action would have been to dismiss those

cases, but not to transfer those cases to this court. *See also* Supreme Court Rule 361(h). The Second District's order is reminiscent of the Appellate orders in *People ex rel. Madigan, supra,* 231 Ill. 2d at 388, since the order in the present appeals did not positively rule that the three first filings were without jurisdiction, but merely stated that the First District had jurisdiction without indicating the basis of its conclusion or that the Second District did not have jurisdiction. *Contra* Supreme Court Rule 361(h).

Subsection 10-201(a) of the Public Utilities Act, 220 ILCS 5/10-201(a), provides that the court first acquiring jurisdiction of any appeal from a Commission order has jurisdiction over all subsequent appeals from the same Commission order. In *Illinois Bell Telephone Co. v. Illinois Commerce Commission,* 414 Ill. 275, 282-3 (1953), appeals from that rate case had been taken to the Circuit Court of Kane County and the Superior Court of Cook County. The Supreme Court held that there can be a valid appeal only to one court (414 Ill. at 282). [This is still the law. *People ex rel Madigan, supra,* 231 Ill. 2d at 387-389.] The Court noted that an appeal could be taken to either county since both counties were "affected" by the rate schedule, *i.e.,* both counties were within the service territory of the utility and the underlying case affected the entire service territory of the utility (414 Ill. at 282). *See also Ferndale Heights Utility Co. v. Illinois Commerce Commission,* 112 Ill. App. 3d 175, 178 (1st District, 1982) [appeal to Sangamon County by utility located only in Cook County was without subject matter jurisdiction under the statute; appeal could be transferred to jurisdictional court]. However, it is not clear which appeal in 1953 was filed first, only that the appeal to Cook County lacked jurisdiction because it was taken by a party not adversely affected by the decision, *i.e.,* a successful party (414 Ill. at 283).

Although Peoples Gas is located entirely within Chicago, North Shore Gas Co. also serves Lake County (R. Vol. 1, C00011). Thus, the rates established in the underlying proceeding affect customers in both the First and Second Districts of the Illinois Appellate Court. Thus, under the statute, an appeal could be taken to either the First or the Second District of the Appellate Court. 220 ILCS 5/10-201(a)

In the recent decision of *Strategic Energy LLC v. Ill. Commerce Commission*, 369 Ill. App. 3d 238, 241 (2nd Dist., 2006), Strategic filed an appeal in the Second District without having ever filed for rehearing. The IBEW filed a proper appeal to the Fifth District. The Second District denied all Motions to Dismiss, and the Fifth District transferred the IBEW appeal to the Second District which then had the first appeal in time (369 Ill. App. 3d at 241). After briefing, the Second District agreed that Strategic's appeal was without jurisdiction both for failure to comply with the statute and for being an appeal from a successful party and dismissed Strategic's appeal (369 Ill. App. 3d at 244-7). The Second District thereupon ruled on the merits of IBEW's transferred appeal (369 Ill. App. 3d at 247-254).

In direct administrative appeals to the Appellate Court, strict compliance with the statute is necessary. Ill. Const. 1970, Art. VI, §6. *People ex rel. Madigan v. Illinois Commerce Commission*, 231 Ill. 2d 370, 387 (2008). 220 ILCS 5/10-201(a) does not conflict with any Supreme Court Rule for *(a)* Supreme Court Rule 335 does not address which district of the appellate court can get a direct administrative appeal and *(b)* this statutory right to choose an appellate District does not arise in appeals from the Circuit Court. Supreme Court Rule 335(i)(1) [insofar as appropriate, other Supreme Court Rules apply to direct administrative review]. *ESG Watts, Inc. v. Pollution Control*

Board, 191 Ill. 2d 26, 29-32 (2000) [rule of liberal construction of court rules does not apply to failure to meet statutory requirements for direct administrative appeal].

The Commission, thus, argues that the Second District acquired exclusive jurisdiction to hear the appeal from Ill.C.C. Docket Nos. 07-0241 and 07-0242 (cons.). The right of the three parties (the Utilities, Abbot Labs, and the People) to take appeals during the pendency of rehearing at the Commission has been established by the Supreme Court's actions in the 2001 and 2008 ComEd cases. *Commonwealth Edison Co. v. Illinois Commerce Commission*, 332 Ill. App. 3d 1038, 1046-7 (2nd Dist., 2002) *citing* 195 Ill.2d 576 (2001) and *Commonwealth Edison Co v. People ex rel Madigan* Docket No. 107694,, Supervisory Order of January 15, 2009, Comm. App., pp. A2-A3. Because Supreme Court Rule 303 no longer requires dismissal of premature dismissals from final orders, the reasoning of *Commonwealth Edison Co. v. Illinois Commerce Commission*, 368 Ill. App. 3d 734, 739-740 (2nd Dist., 2006) no longer reflects Illinois law. Again note that this latter case dealt with pending applications for rehearing rather than a pending rehearing.

Further, and in any event, the present consolidation is improper. These appeals should have been first consolidated in the Second District for its determination of whether it obtained jurisdiction. *People ex rel. Madigan, supra,* 231 Ill. 2d at 388-9; *Strategic Energy LLC v. Ill. Commerce Commission*, 369 Ill. App. 3d 238, 241 (2nd Dist., 2006); and *Commonwealth Edison Co. v. Illinois Commerce Commission*, 332 Ill. App. 3d 1038, 1046-7 (2nd Dist., 2002) *citing* 195 Ill.2d 576 (2001); *Commonwealth Edison Co v. People ex rel Madigan*, Docket No. 107694, Supervisory Order of January 15, 2009, Comm. App., pp. A2-A3. The first three appeals, if without

jurisdiction, should have been ruled upon by the Second District and dismissed. Supreme Court Rule 361(h). This matter goes to the heart of the jurisdiction of the First District to hear these appeals.

B. Scope and Standard of Review

In reviewing a Commission decision under the Public Utilities Act, 220 ILCS 5, the Commission's order is to be considered *prima facie* reasonable. 220 ILCS 5/10-201(d). In seeking to overturn such an order, the party appealing the Commission's decision has the burden of proof on all issues. *Id*. Review of the order is limited to the following questions: whether the Commission acted within its authority, whether it made adequate findings to support its decision, whether the decision is supported by substantial evidence, and whether constitutional rights have been violated. 220 ILCS 5/10-201(e)(iv). *Illinois Bell Telephone Company v. Illinois Commerce Commission*, 55 Ill. 2d 461, 469 (1973).

In analyzing the Commission's order, it is firmly established that the Commission is entitled to great deference from the reviewing court because it is an administrative body possessing expertise in the field of public utilities. *Archer-Daniels-Midland Company v. Illinois Commerce Commission*, 184 Ill. 2d 391, 397 (1998) and *United Cities Gas Co. v. Illinois Commerce Commission*, 163 Ill. 2d 1, 12 (1994). Thus the reviewing court must not put itself in the place of the Commission and conduct an independent investigation or substitute its judgment for the Commission. *Produce Terminal Company v. Illinois Commerce Commission*, 414 Ill. 528, 589 (1953).

As recognized by the Supreme Court, where the propriety of the means or methods used by the Commissioners in the exercise of clearly conferred power is questioned, all doubts should be resolved in favor of the Commissioners in the interest of the administration of law. *State Public Utilities Commission v. Springfield Gas Company*, 291 Ill. 209, 216 (1920). In fact, the Illinois Supreme Court has declared that deference to the Commission's judgment is "especially appropriate" on rate issues. *Iowa-Illinois Gas & Electric Company v. Illinois Commerce Commission*, 19 Ill. 2d 436, 442 (1960).

While the Commission's interpretation of a legal question is not binding on a reviewing court, where the legislature delegates the administration of a broad statutory standard to an agency's discretion, "courts shall rely upon the agency's interpretation where there is reasonable debate as to the statute's meaning." *Business and Professional People v. Illinois Commerce Commission*, 171 Ill. App. 3d 948, 957 (1st Dist. 1988) and *State of Illinois v. Church*, 164 Ill. 2d 153, 162 (1995). The interpretation of a statute by the agency charged with the administration of the statute is entitled to substantial deference, and such construction should be and normally is persuasive. *Milkowski v. Dept. of Labor*, 82 Ill. App. 3d 220, 222 (1st Dist., 1980). Where the issues in the case involve the Commission's interpretation and application of provisions of the Public Utilities Act, courts will give weight to such administrative interpretations, up to equal weight with judicial construction. *Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill. 2d 509, 514 (1953) and *MCI Telecommunications Corp. v. Illinois Commerce Commission*, 168 Ill. App. 3d 1008, 1012 (1988).

Regarding evidentiary challenges, reviewing courts have determined that substantial evidence may support more than one possible finding, and possibly several. The evidence only need be such that a reasoning mind would accept as sufficient to support a particular conclusion. *CIPS v. Illinois Commerce Commission*, 268 Ill. App. 3d 471, 479 (4th Dist.1994) In fact, merely showing that the evidence presented can support a *different* conclusion than the one reached by the Commission is not sufficient. Rather, appellants must affirmatively demonstrate that the conclusion *opposite* to the one reached by the Commission is "clearly evident." *Continental Mobile Telephone Co. v. Illinois Commerce Commission*, 269 Ill. App. 3d 161, 171 (1st Dist. 1994).

This Brief will demonstrate that the various petitioners have failed to carry their burdens of proof. Their allegations of error are unpersuasive and fall short of overcoming the presumption of reasonableness accorded Commission orders. An affirmance of the Commission is, therefore, warranted.

II. RESPONSE TO THE PEOPLE, CUB AND THE CITY OF CHICAGO ("GCI")

A. The Adoption of Rider VBA was an Appropriate Exercise of the Commission's Discretionary Ratemaking Authority.

The Utilities proposed several new "tracker" riders, including Riders VBA. R. Vol. 5, C00865; R. Vol. 22, C04732. As noted by their expert witness, Russell Feingold, North Shore's and Peoples' business conditions present considerable challenges to their ability to achieve reasonable financial performance and stability. R. Vol. 5 C00868; R. Vol. 22, C-04735. Among these conditions are unpredictable and changeable weather conditions, volatile natural gas commodity prices, declining customer gas usage, and growth in the level of uncollectible accounts expenses on

Utilities' systems. These conditions have added elements of volatility and uncertainty to the utility's operations that necessitate a fundamental change to the traditional ratemaking process through the application of new ratemaking mechanisms, such as Rider VBA, to preserve North Shore's and Peoples' financial health.

To ameliorate the uncertainty of the Utilities' operation, they proposed Rider VBA, an automatic adjustment rider which was designed to (1) recognize the variability in use per customer and its impact upon the volumetric components of its base rates and (2) will adjust rates (up or down) on a monthly basis to enable the utility to recover its approved level of margin revenues. R. Vol. 5, C00877. Rider VBA provides the Utilities with a measure of assurance of recovery of the portion of the revenue requirement approved by the Commission in these proceedings that is to be recovered through volumetric charges. In other words, Rider VBA was designed to recover "margin revenues"[1] and would operate to adjust customer prices under Service Classifications Nos. 1 and 2 in a way that the Utilities' revenues are held constant despite changes in customer consumption (Order p. 138; R. Vol. 85, C20767).

The Utilities considered the Rider necessary because, although a very large percentage of their costs are fixed rather than variable, a significant portion of those fixed costs would be recovered through volumetric distribution charges. Rider VBA, was proposed to remove both the incentive utilities have to increase sales and the disincentives that utilities have to encourage energy efficiency for their customers.

[1] Margin revenues means the Utilities' total cost of service, exclusive of purchased gas expenses and "flow-through" items. R. Vol. 5, C-00879. Margin revenues are the equivalent of total distribution revenues, base revenues, or the revenue requirement. For consistency, the term "Margin Revenues" is best utilized for purposes of discussion of the Utilities' Rider VBA proposal, with the understanding that the Rider involves the portions to be recovered through volumetric charges.

Thus Rider VBA is a "decoupling mechanism" which would determine an adjustment on a monthly basis for the effects of weather and usage changes, such as those caused by conservation measures, on the Utilities' rates.

Although the proposed adoption of this type of mechanism is a matter of first impression before the Commission, currently there are eleven (11) states that have approved revenue decoupling in some form, with fourteen (14) additional states (including the District of Columbia) currently addressing revenue decoupling issues (R., Vol. 55, C13044).

The People of the State of Illinois, the Citizens Utility Board and the City of Chicago ("Government & Consumer Petitioners" or "GCI") oppose the Commission's adoption of Rider VBA. Their objections are insufficient to overturn the Commission's rate design in this case.

1. Rider VBA is an appropriate vehicle for recovering the Utilities' revenue requirement

GCI claim that that the Utilities failed to prove that Rider VBA was needed. Br. p. 35. They point to the testimony of Staff witness Lazare and GCI witness Brosch in their attempt to undermine the Commission's conclusions. However, Utility witnesses Feingold and Borgard responded to these witnesses' contentions (R. Vol. 50, C11718; R. Vol. 50, C11829; R. Vol. 55, C13038; R. Vol. 55, C13095) and, in the end, the Commission was persuaded as to the correctness of the Utility position. R. Vol. 50, C11842 – C11843; R. Vol. 55, C13102 – 13103. The Commission's decision regarding the appropriateness or need for Rider VBA is an evidentiary conclusion, supported by substantial evidence, which is owed deference by this court. *Abbott Laboratories, Inc. v. Illinois Commerce Commission,* 289 Ill. App. 3d 705, 713 (1st Dist. 1997).

The Commission extensively analyzed the record and the parties' arguments in this case (C20755-C20782) before arriving at the conclusion that Rider VBA is appropriate as it reflects the particulars of declining and variable customer usage patterns and the concomitant revenue recovery impacts for Peoples Gas and North Shore. Order p. 150, R. Vol. 86, C20779. In the Commission's view, record evidence of usage patterns and margin recovery fluctuations calls for a regulatory response. Order p. 150, R. Vol. 86, C20779. This conclusion is supported by substantial evidence in the record and should be affirmed. R. Vol. 5, C00871 – C00899; R. Vol. 22, C04735 – C04769; R. Vol. 1, C00152 –C00153, R. Vol. 19, C4237 – C4239. The fact that the record contains some evidence which would support a different conclusion is unremarkable and insufficient to overturn the Commission's order. In order to prevail GCI must affirmatively demonstrate that the conclusion *opposite* to the one reached by the Commission is "clearly evident." *Continental Mobile Telephone Co. v. Illinois Commerce Commission*, 269 Ill. App. 3d 161, 171 (1st Dist. 1994). This they have failed to do.

The Commission correctly concluded that Rider VBA is appropriate as it reflects the particulars of declining and variable customer usage patterns and the concomitant revenue recovery impacts for Peoples Gas and North Shore.

2. Rider VBA is consistent with ratemaking principles

The Commission has very broad discretionary power to design rates which will compensate utilities for rendering service. This is borne out by the fact that in entrusting the Commission with the power to set utility rates the legislature did not confine the Commission to a particular methodology. It neither mandated recovery

purely through base rates nor purely through riders nor through any particular mix of the two. In fact, the only statutory admonition to the Commission in designing rates is that rates and charges are to be "just and reasonable." 220 ILCS 5/9-101. In one of the very first Illinois cases to discuss the nature of just and reasonable rates, the Illinois Supreme Court explained that what is a just and reasonable rate is a question of sound business judgment based upon the evidence and not one of "mere legal formula." *State Public Utilities Commission v. Springfield Gas Company*, 291 Ill. 209, 218 (1920). The goal of ratemaking is "permit the utility to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made . . . on investments in other business undertakings which are attended by corresponding risks and uncertainties." *Bluefield Waterworks & I. Co. v. Public Service Commission*, 262 U.S. 679, 692 (1922).

Automatic cost recovery mechanisms, such as cost recovery riders, are employed where circumstances warrant a recovery through such a mechanism. *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111, 138 (1995). The Illinois Supreme Court in *City of Chicago v. Illinois Commerce Commission*, 13 Ill.2d 607 (1958) described the question of the Commission's authority in choosing between the employment of base rate versus rider recovery as being a matter "committed to the Commission's sound discretion. . ." and which, "in the absence of an abuse of discretion, is not within the scope of the judicial process." *City of Chicago v. Illinois Commerce Commission,* 13 Ill.2d 607, 618 (1958). Thus, the Commission undertook to set out in its Order a "sound and lawful analysis" sufficient to satisfy this court's

judicial inquiry. Order p. 150 (R. Vol. 86, C20779) citing *City of Chicago v. Illinois Commerce Commission,* 281 Ill. App. 3d 617, 622 (1st Dist. 1996).

GCI's main opposition (Br. p. 23) to the adoption of Rider VBA is that it runs afoul of ratemaking principles which GCI imply suggest that just and reasonable rates cannot guarantee specific levels of revenue such as margin revenue, citing *Fed. Power Commission v. Hope Gas Co.,* 320 U.S. 591, 610 (1943); *Fed.. Power Commission v. Natural Gas Pipeline Co.,* 315 U.S. 575, 590 (1942). While those cases certainly provide that regulation, as it existed at the time of those cases, was not required to insure that utility businesses would be guaranteed to "produce net revenues", neither did they hold that regulation was prohibited from insuring that utilities were guaranteed to recover some or all of their net revenues.

In addition, GCI contends that proposed Rider VBA violates the Commission's and Illinois law's test-year principles by selecting only one component of the revenue requirement, in this case a slice of overall revenues (margin revenues per customer in the Rate 1 and 2 classes), then tracking changes in that revenue requirement component and assessing rate adjustments to recognize this change. As demonstrated below in Section II. A. 5 of this brief, pp. 18-19, this argument is without merit.

While GCI note that no provision of the Act authorizes a revenue decoupling rider such as Rider VBA (Br. p. 25), the reverse is also true. GCI fails to cite a single provision of the Act which forbids a revenue decoupling rider.

3. Rider VBA does not violate strictures against single-issue ratemaking

The prohibition against single issue ratemaking is based on the regulatory principle that a utility's revenue requirement should be based on the aggregate costs

and demand of the utility. *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 146 Ill. 2d 175 (1991). Accordingly, when the Commission sets about to establish a utility's revenue requirement in a general rate case, such as the present case, it is improper for the Commission to consider changes to components of the revenue requirement in isolation. *Citizens Utility Company v. Illinois Commerce Commission*, 166 Ill. 2d 111, 136-137 (1995). The instant case does not run afoul of single-issue ratemaking prohibitions for the simple reason that the Commission established the Utilities' revenue requirement in the traditional way. GCI does not suggest otherwise. GCI's complaint lies not with the establishment of the Utilities' revenue requirement but with the rate design mechanism the Commission has implemented to recover that revenue requirement.

4. Rider VBA does not Violate Strictures Against Retroactive Ratemaking

After a thorough analysis of applicable case law the Commission concluded that Rider VBA presented no violation of the rule against retroactive ratemaking (Order p. 145; R. Vol. 85, C29774). Retroactive ratemaking occurs where the Commission revisits rate treatment granted in a previous order and attempts to correct mistakes in that order by making a retroactive adjustment. *Citizens Utilities Co. v. Illinois Commerce Commission*, 124 Ill. 2d 195, 206-07 (1988). In other words, the Commission cannot in one rate order retroactively deny rate treatment granted in a previous order. As determined by the Commission, Rider VBA does not disturb either the current order or any of the Commission's prior orders (Order p. 145; *Id*.). Nor does Rider VBA disallow charges or benefits previously ordered.

GCI's argument (Br. p. 31) rests on the faulty premise that Rider VBA circumscribes the prospective nature of ratemaking, by allowing utilities to increase changes to make up for demand levels that are below what they describe as an artificial per-customer revenue benchmark. Nothing, however, circumscribes the Commission's authority to establish a new schedule of rates in the future in another rate proceeding.

GCI closes with the inaccurate claim that had Rider VBA been in effect from 2000 to 2006 that "rates would *not* be what they were – they would have been $242 million more." Br. p. 32. This misapprehends the situation. It is not the rates which would have changed but the revenues generated by the rates. The problem with retroactive ratemaking, as identified by the court in *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 136 Ill. 2d 192, 209 (1989), is that if the utility's earnings (in that case Commonwealth Edison Company) were excessive in any particular year, the Commission could order a refund in the following year. The Rider in this case does not attempt to adjust the Utilities' rates to reflect excess or insufficient earnings.

In the end, the rate schedule approved by the Commission in this case hews to the requirements of *City of Chicago v. Illinois Commerce Commission*, 13 Ill. 2d 607 (1958) where the court explained:

> [An adjustment] clause is nothing more or less than a fixed rule under which future rates to be charged the public are determined. It is simply an addition of a mathematical formula to the filed schedules of the Company under which the rates and charges fluctuate as the wholesale cost of gas to the Company fluctuates. Hence, the resulting rates under the escalator clause are as firmly fixed as if they were stated in terms of money.
> *City of Chicago, supra*, 13 Ill. 2d at 613.

Under *City of Chicago's* guidance, where, as here, a rate schedule approved by the Commission contains a mathematical formula for making future changes in the rate schedule, it is not unlawful under the doctrine of retroactive ratemaking. As such, the GCI's argument is unfounded.

5. Rider VBA is Consistent with Test-Year Principles

The purpose of a test year is to prevent a utility from overstating its revenue requirement by mismatching low revenue data from one year with high expense data from a different year. *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 146 Ill. 2d 175, 238 (1991); Business *and Professional People for the Public Interest v. Illinois Commerce Commission*, 136 Ill. 2d 192, 219 (1989). The rates established by the Commission in this case were generated, just as in any other traditional general rate case proceeding, by examining the costs and expenses submitted in compliance with the Commission's test year rules and establishing a revenue requirement. GCI's makes no claim otherwise.

As such, the base rates that are approved in this case and which are the basis for the margin revenues to be recovered under Rider VBA have been evaluated in accordance with the appropriate test year prescriptions. The fact that a portion of the revenue requirement will be recovered through a rider does not alter the situation. Riders have been generally determined not to be single issue ratemaking. As the Illinois Supreme Court observed in *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111 (1995):

> [A] rider mechanism merely facilitates direct recovery of a particular cost, without direct impact on the utility's rate of return. The prohibition against single-issue ratemaking requires that, in a general base rate proceeding, the Commission must examine all elements of the revenue requirement formula to determine the

> interaction and overall impact any change will have on the utility's revenue requirement, including its return on investment. The rule does not circumscribe the Commission's ability to approve direct recovery of unique costs through a rider when circumstances warrant such treatment.
> *Citizens Utility Board, supra,* 166 Ill. 2d at 138

Additionally, the Illinois Supreme Court has been clear that a rider does not violate test year prescriptions when it is accompanied by a reconciliation feature:

> [T]he test-year rule seeks to avoid a problem not present when expenses are recovered through a rider. The reconciliation formula used to determine the amount of the rider charge includes a matching of costs incurred with revenue realized.
> *Citizens Utility Board, supra,* 166 Ill. 2d at 139

GCI's claims regarding alleged test year violations are without merit.

6. Rider VBA does not Result in Unlawful Rate Discrimination

GCI claim that the application of VBA to two classes of residential ratepayers violates the Act's prohibition against unlawful rate discrimination. There is no unlawful discrimination as that term is understood under the Act. Section 9-241 of the Act provides, in part, that:

> No public utility shall, as to rates or other charges, services, facilities or in other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any *unreasonable* difference as to rates or other charges, services, facilities, or in any other respect, either as between localities or as between classes of service.
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> Any public utility, with the consent and approval of the Commission, may as a basis for the determination of the charges made by it classify its service according to the amount used, the time when used, the purpose for which used, and *other relevant factors*.
> 220 ILCS 5/9-241 (emphasis added).

In general, the test to be applied in determining whether there has been a violation of the discrimination provisions of the Act is whether the difference is

reasonable and not arbitrary. *Citizens Utilities Company v. Illinois Commerce Commission*, 50 Ill. 2d 35 (1971).

As the Commission observed, it is Rate 1 and 2 (residential) customers who will benefit under energy efficiency measures and also these customers that have the best opportunity to conserve (Order p. 148; R. Vol. 86, C20777). It is not discrimination per se, but unreasonable discrimination that must be established, a burden GCI has failed to carry. 220 ILCS 5/10-201(d).

B. The Commission Properly Reduced the Utilities' Cost of Equity By Ten (10) Basis Points

As an alternative proposal, GCI (Br. at 38-40) suggest that 60 basis points be removed from the cost of common equity because of the existence of Rider VBA. The Commission determined that a 10-basis point adjustment was appropriate. *See* Section III.B. of this Brief, pp. 37-39, which contains the Commission's response to the Utilities' reciprocal claim that no adjustment to the cost of common equity for Rider VBA should have been made. The Commission's authority to exercise a sound business judgment on the amount of the adjustment cannot be questioned. *City of Alton v. Illinois Commerce Commission,* 19 Ill. 2d 76, 82 (1960) [Commission chose a 25% depreciation rate, where witnesses recommended either 15% or 26%]; *People ex rel. Hartigan v. Illinois Commerce Commission,* 202 Ill. App. 3d 917, 951-953 (1st Dist., 1980) [Commission adjusted the auditors' calculation while rejecting the calculations of the auditors, Commission staff, the Attorney General and the Joint Intervenors]; and *Institute of Shortening and Edible Oils Inc. v. Illinois Commerce Commission*, 45 Ill. App. 3d 98, 100-1 and 104 (4th Dist., 1977) [Commission sustained against a "no

evidence" objection, where the Commission had denied the utility's curtailment petition and, instead, set higher rates for interruptible service].

The rejection of GCI's proposal was evidentiary. Although the Commission agrees that some accounting of the lessened risk which the Utilities have because of Rider VBA should be applied, the 60 basis point proposal of GCI was found to have been grounded in a fundamentally flawed study which could not be used to determine the amount of deduction of the cost of common equity (Commission Order, pp.87-88 and 99; R. Vol. 85, C20716-C20717 and C20728; Utilities' witness, James F. Schott, Reb. Ex. JFS-2.0, pp. 5- 6, R. Vol. 51, C12076-C12077 and GCI's witness Christopher C. Thomas, R. Vol. 95, Tr. 1099-1101). Although GCI argues that the 60 basis point adjustment to the cost of common equity because of Rider VBA is still appropriate, their witness had based his opinion on two riders being allowed (CUB-City Ex. 1.0, pp. 60-62; R. Vol. 44, C10171-C10173), one of which (Rider UBA) was not approved (Commission Order, pp. 230, R. Vol. 86, C20859). Inherently, if GCI's proposed adjustment to the cost of common equity is due to the lessened risk of having two Riders, the adjustment cannot be the same for only one rider.

The Commission is the entity charged with weighing the testimony. *Schussler v. Illinois Commerce Commission*, 410 Ill. 289, 294 (1951). The Courts do not substitute their judgment for that of the Commission. *Produce Terminal Co. v. Illinois Commerce Commission*, 414 Ill. 528, 589 (1953). The Commission is entitled to accept the Utilities' testimony over GCI's witness. *United Cities Gas Co. v. Illinois Commerce Commission*, 47 Ill. 2d 498, 500-1 (1970). The Commission's rejection of the 60 basis point adjustment to the cost of common equity should be sustained on appeal.

C. Accepting GCI's Proposed Depreciation Adjustment Would Result in a Violation of the Commission's Test Year Rules

In setting base rates the Commission generally employs a test year. The purpose of a test year is to prevent a utility from overstating its revenue requirement by mismatching low revenue data from one year with high expense data from a different year. *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 146 Ill. 2d 175, 238 (1991) and *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 136 Ill. 2d 192, 219 (1989). The Utilities each proposed a Historical test year, the Companies' fiscal year 2006, *i.e.*, the twelve months ending September 30, 2006, as their test year (R. Vol. 3, C00450 and Vol. 21, C04537, Salvatore Fiorella Dir., PGL-NS Exs. SF-1.0 at 5). The 2006 test year data were based on the Utilities' actual 2006 revenues, expenses, and rate base items, subject to appropriate adjustments (*Id*. at 6-7).

The rate bases of the Utilities (original cost less depreciation reserve) were determined for the test year ending in September 30, 2006 (Order, pp. 7-9, R. Vol. 85, C20636-C20638). The Utilities also sought recognition for certain *pro forma* capital additions (*Id*., p. 9, C20638), pursuant to 83 Ill. Adm. Code 287.40 (R. Vol. 3, C00454-C00463 and C00483-C00492 and Vol. 21, C04541-C04550 and C04574-C04587NS Ex. SF-1.0, at 9, 14-15 & 17- 18; NS Ex. SF-1.1, Sched. B-1, line 2, Sched. B-2, column [B], Sched. B-2.1, Sched. B-6; PGL Ex. SF-1.0 at 9, 14-15 & 18; PGL Ex. SF-1.1, Sched. B-1, line 2, Sched. B-2, column [B], Sched. B-2.1, Sched. B-6). That provision states:

Section 287.40 Pro Forma Adjustments to Historical Test Year Data

> A utility may propose pro forma adjustments (estimated or calculated adjustments made in the same context and format in which the affected information was provided) to the selected historical test year for all known and measurable changes in the operating results of the test year. These adjustments shall reflect changes affecting the ratepayers in plant investment, operating revenues, expenses, and cost of capital where such changes occurred during the selected historical test year or are reasonably certain to occur subsequent to the historical test year within 12 months after the filing date of the tariffs and where the amounts of the changes are determinable. Attrition or inflation factors shall not be substituted for a specific study of individual capital, revenue, and expense components. Any proposed known and measurable adjustment to the test year shall be individually identified and supported in the direct testimony of the utility. Each adjustment shall be submitted according to the standard information requirement schedules prescribed in 83 Ill. Adm. Code 285.
>
> 83 Ill. Adm. Code 287.40 (emphasis supplied)

Certain adjustments were made to the Utilities' *pro forma* capital additions, mostly because the Staff witness testified that some of the expenditures were not known or measurable within the additional 12 month period. Staff Ex. 15.0 (corrected), pp. 14- 17 and Sch. 15.2 N and P (corrected), R. Vol. 56, C13398-C1340, C13416-C13417 and C13424-C13425. The Utilities ultimately accepted this adjustment (R. Vol. 56, C13320-13323). Despite GCI's argument, depreciation related to the *pro forma* capital additions was included by Staff's adjustment (*Id*., C13400, C13416 and C13417). See also Commission Order, pp. 9-10, R. Vol. 85, C20638-C20639. These numbers are after depreciation and are not a gross number (Test. of S. Fiorella, R. Vol. 90, Tr. 131, ll. 11-17).

GCI (Br. at 40-49) opposes this methodology arguing that, while the Utilities recognize the increase in accumulated depreciation directly related to the forecasted plant additions, they do not recognize the growth in accumulated depreciation on embedded plant-in-service that will be taking place as the new plant additions are going

into service. GCI is wrong and, in fact, the opposite is true: accepting GCI's proposed depreciation addition would result in a violation of the Commission's Test Year Rules.

The Commission disputes the claim of GCI (Brief, p. 14) that the *pro forma* capital additions are hypothetical in the usual sense of the word. If the capital additions were truly hypothetical, they would not represent known and measurable changes. *Governor's Office of Consumer Services v. Illinois Commerce Commission,* 242 Ill. App. 3d 172, 190 (1st Dist., 1993) [increased postal expense not known or measurable]. *Cf. CILCO v. Illinois Commerce Commission,* 252 Ill. App. 3d 577, 581-2 (3rd Dist., 1993) [updated construction schedule not accepted to change revenue requirements]. To extent that the "hypothetical" claim is that the *pro forma* adjustments are not historical or final, that is inherent for such an estimated or calculated amount.

Although GCI's Brief (p.43) notes the significant amount of *pro forma* capital additions, GCI and its witness did not challenge the amount as not being known or measurable. Incidentally, the numbers given by GCI at page 43 are the after depreciation figures (Order, pp. 9-10, R. Vol. 85, C20638-C20639). The Commission is not authorized to ignore such changes. *Commonwealth Edison Co. v. Illinois Commerce Commission,* 322 Ill. App. 3d 846, 853 (2nd Dist., 2001); *Central Illinois Public Service Co. (AmerenCIPS), et al,* (*"2003 Ameren case*"), Ill.C.C. Docket Nos. 02-0798, 03-0008, & 03-0009 (cons.), Order of October 22, 2003, pp. 7, 8 and 10 (limited significant items but not all rate base items may be adjusted for known and measurable changes under 83 Ill. Adm. Code 285.150), 2003 Ill. PUC LEXIS 824, *12-*16 and *20-*21, Comm. App., pp. A15-A17. Thus, the *2003 Ameren case* does not stand for the proposition that other rate base items in the test year can be adjusted

generally. Yet that is all that GCI is seeking, the general inclusion of an additional 12 months of depreciation related to the test year rate base item of plant in service (GCI Ex. 2.0 (Test. of David J. Effron), p. 6, ll.117-120, R. Vol. 48, C11140 and GCI Ex. 5.0 (Reb. Test. of David J. Effron), pp. 3-4, R. Vol. 52, C12366E-C12366F). *See also* (Test. of S. Fiorella, R. Vol. 90, Tr. 131, ll. 18-22).

GCI's witness has attempted in this case, as he had attempted in at least one previous case (*Commonwealth Edison Co. ("2006 ComEd case"),* Ill.C.C. Docket No. 05-0597, Order of July 26, 2006, pp.12-15, 2006 Ill. PUC LEXIS 43, *24-*33, 250 P.U.R.4th 161, --), Comm. App., pp. A18-A21, to shift the measurement of a portion of the Utilities' rate bases (the depreciation related to the investment in the plant in service) to one year after the test year (Commission Order, p. 17, R. Vol. 85, C20646). The excuse presented is that, because the Utilities have exercised their right to seek recognition of known and measurable changes which are subject to 83 Ill. Adm. Code 287.40 (2006 Ill. PUC LEXIS 43, *25), the test year should be ignored and additional depreciation should be added to the test year rate base. However, in the absence of a rule change, the Commission is not authorized to create such a selective two-year test year rule for rate base. *Business and Professional People for the Public Interest v. Illinois Commerce Commission ("BPI I"),* 136 Ill. 2d 192, 219-228 (1989). As the Commission itself found, GCI's proposed adjustment has nothing to do with the *pro forma* capital adjustments being recognized under 83 Ill. Adm. Code 287.40 (Commission Order, p. 17, R. Vol. 85, C20646).

To the extent, consideration of GCI's *ad hoc* approach to test year is a matter of evidence, it is the Commission which is the expert body which weighs the evidence.

Iowa-Illinois Gas & Electric Co. v. Illinois Commerce Commission, 19 Ill. 2d 436, 443 (1960) and *South Chicago Coal Co. v. Illinois Commerce Commission*, 365 Ill. 218, 224-5 (1937). The Commission could accept the opinion of the Utilities' witness (Salvatore Fiorella) over that of the GCI witness [Ex. SF 2.0 pp. 8-11 and SF 4.0 pp. 8-9, R. Vol.50, C11682-C11686 and Vol. 56, C13325-C13326; see also Staff Ex. 15.0 (corrected), p. 17, Vol. 56, C13401]. *United Cities Gas Co. v. Illinois Commerce Commission*, 47 Ill. 2d 498, 500-1 (1970).

GCI claims on page 47 of its Brief that it was prejudiced by the recognition of the Commission that the argument made by GCI is identical to the argument made and rejected in the *2006 ComEd case* and that GCI made no new, additional or different claim herein [R. Vol. Vol. 72, C17274-C17282 (the People's Reply Brief)]. However, in the absence of any attempt by GCI to address the earlier rejection of its position in this case (when it was before the Commission), the Commission had little choice but to reject the same arguments again. In *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111, 118-119 (1995), the Commission had initiated a generic proceeding into the recovery of coal-tar expenses. Thereafter, in subsequent orders in individual rate cases, the Commission had allowed a few utilities to recover coal-tar expenses. The Illinois Supreme Court ruled that the Commission could not adopt a five-year amortization requirement or a sharing of carrying charges in the generic case, having rejected both items in the individual rate cases (166 Ill. 2d at 132). A significant change in evidence or in argument is needed to support a reasoned change by the Commission from the result in the *2006 ComEd case*. *Citizens Utility Board, supra,* 166 Ill. 2d at 132*; Illinois Power Co. v. Illinois Commerce Commission*, 339 Ill. App.

3d 425, 438-440 (5th Dist., 2003) [Commission requirement of a PVRR study to determine prudence of the utility's action given four prior Commission decisions was arbitrary]; and *United Cities Gas Co. v. Illinois Commerce Commission*, 225 Ill. App. 3d 771, 782-783 (4th Dist., 1992) [the Commission may not depart from prior practices and customs in interpreting its rules, especially where there may have been detrimental reliance on the prior interpretations of its rules]. Otherwise, to now have accepted GCI's adjustment which was rejected in the *2006 ComEd case* would be merely arbitrary as the Commission itself found (Commission Order, p. 17, R. Vol. 85, C20646).

GCI on pages 48-49 of its Brief now cites to the November 7th dissent from the most recent ComEd decision, *Commonwealth Edison Co*, Ill.C.C. Docket No.07-0566, Order of September 10, 2008 ("*2008 ComEd case"*), asking that the Court take notice. The Court should notice that (1) the Commission as represented by the majority of the Commissioners still rejected this shifting of depreciation related to the rate base from test year in the *2008 ComEd case* and (2) no amendment of 83 Ill. Adm. Code 287.40 has been made. *Business and Professional People for the Public Interest v. Illinois Commerce Commission* 136 Ill. 2d 192, 219-228 (1989) [rule change is necessary to vary from one year test year rule]. Pertinent pages from the order *in the 2008 ComEd case* can be found in the Comm. App., pp. A22-A38. The Commission would also note that the *2008 ComEd case* order is on appeal (Docket 2-08-0959, etc. (cons.)). It is not clear that the parties in the *2008 ComEd case* merely mimicked the same testimony and argument contained in this appeal and the *2006 ComEd case*, for the Commission found their arguments to be "reconstituted." (p. 29 of the Order in the *2008 ComEd case*,

Comm. App., p. A37). See for example pages 18-19 and 29 of the Order in the *2008 ComEd case* that the additional year of depreciation also constituted a mere attrition adjustment which is forbidden under 83 Ill. Adm. Code 287.20 and 287.40. Comm. App. pp A26-A27 and A37. See also the *2006 ComEd case*, 2006 Ill. PUC LEXIS 43, *27 and *32-*33 (Commission concurs with ComEd), Comm. App., p. A19 and A21.

Although GCI attempts to turn this matter into a strict legal issue, the plain fact is that the recovery of known and measurable changes, including capital expenditures, varies with the evidence submitted in the cases (Commission Order, p. 16, R. Vol. 85, C20645; *see also* R. Vol. 52, C12366G (Test. of David J. Effron) and Vol. 66, C15784 (City and CUB Brief, "Utility witness agreed that circumstances of past decisions determine whether adjustment is appropriate."). Since GCI attempts to elevate the distinguishable *2003 Ameren case* into binding precedent, it should be noted that the Commission order therein was not subjected to judicial review and, in any event, Commission decisions do not have a *res judicata* effect. *Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill. 2d 509, 513 (1953). In the *2003 Ameren case*, for the utilities therein, there was decreasing or level net plant in service (R. Vol. 56, C13325, ll. 168-171 (AmerenCIPS); 2003 Ill. PUC LEXIS 824, *20, Comm. App., p. A17), whereas in the present cause as well as in the *2006 ComEd case*, the utilities had increasing net plant in service (Order, p. 10, R. Vol. 85, C20639). *2006 ComEd case*, 2006 Ill. PUC LEXIS 43, *30, Comm. App., p. A20. It was the declining or relatively static amounts of historical net plant in service which led to the further analysis test in *2003 Ameren case*, 2003 Ill. PUC LEXIS 824, *20, Comm. App., p. A17. The witness herein does appear to be merely taking a 12-month attrition factor for depreciation

which is forbidden by 83 Ill. Adm. Code 287.40. *2006 ComEd case*, 2006 Ill. PUC LEXIS 43, *29-*30 and *33, Comm. App., pp. A20-A21.

GCI is attempting to do the very thing condemned in *Business and Professional People for the Public Interest v. Illinois Commerce Commission ("BPI II"),* 146 Ill. 2d 175, 237-238 (1991), mismatching the test year capital investment in rate base with a different test-year's depreciation. This depreciation is not related to the *pro forma* adjustment for capital additions to which 83 Ill. Adm. Code 287.40 applies but is an additional attrition for depreciation to the test year rate base for which test-year depreciation is already accounted. GCI is attempting to substitute a 2007 test year depreciation for the 2006 test year rate base (Staff Ex. 15.0 corrected, p. 17, R. Vol. 56, C13401). This is simply an attempt to add 12 additional months of depreciation to the rate base. *BPI II, supra,* 146 Ill. 2d at 239-241 (1991) [annual (and not biannual) depreciation is recognized]. The Commission correctly rejected GCI's attempt to subvert the test year.

III. RESPONSE TO THE UTILITIES

A. The Commission Appropriately Denied Recovery of Incentive Compensation Expenses for the STIC, Affiliate Charges and Restricted Stock & Performance Shares Plans

Over the testimonial objections of Commission Staff and the Governmental and Consumer Intervenors ("GCI"), the Utilities sought to recover costs associated with several incentive compensation plans. Having weighed the testimony of Utilities, Commission Staff, and CGI witnesses, the Commission allowed recovery of potential expenses for two of the programs (the Team Incentive Award ("TIA") plan and the Individual Performance Bonus plan) which the Commission determined provided direct

benefits to ratepayers (Order pp. 66-67, R. Vol. 85, C20695–C20696). The Commission observed that, to motivate and maintain high standards, a utility may reasonably offer incentive compensation as the best way to match both employer and employee interests and to ensure quality work performance (Order p.66, R. Vol. 85, C20695). This is true particularly when proposed expenses relate to matters of customer service, customer satisfaction, the reduction of operating expenses and other similar aspects of providing customer service. The Commission, however, disallowed cost recovery for three other incentive compensation plans (the Short-term Incentive Compensation ("STIC") plan, officers' incentive compensation and bonuses charged by Peoples Energy Corporation to Peoples Gas and North Shore, and restricted stock and performance shares plans) which failed to demonstrate the cost saving or other direct ratepayer benefits that the Commission requires in order to include such costs in rates (Order p. 66, R. Vol. 85, C20695). This determination is reasonable, lawful and supported by the record.

Generally speaking the costs to be recovered in rates are those which are shown to be prudently and reasonably incurred. *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111 (1995). The burden of proof to establish the justness and reasonableness of proposed rates or charges is on the utility. 220 ILCS 5/9-201(c). Ratepayers, however, are not required to pay any part of costs unless the utility shows that such costs directly benefit either ratepayers or the services the utility renders. *Illinois Bell Telephone Company v. Illinois Commerce Commission*, 55 Ill. 2d 461, 482-83 (1973).

The particular issue of the recoverability of incentive compensation costs has been a matter of contention in utility rate cases for many years. See *Commonwealth Edison Co.*, ICC Docket No. 05-0597, at 97, 2006 Ill. PUC LEXIS 43, *247 (Order, July 26, 2006)*; Consumers Illinois Water Co.*, ICC Docket No. 03-0403, at 14-15, 2004 Ill. PUC LEXIS 382, *25 (Order, April 13, 2004); *Northern Illinois Gas Co.*, ICC Docket No. 95-0219, 1996 Ill. PUC LEXIS 204, *62, (Order, April 3, 1996); and *Commonwealth Edison Co.*, Docket 01-0423, at 129, 2003 Ill. PUC LEXIS 311, *319-320 (Order, March 28, 2003).

In looking at the incentive compensation issue, the Commission generally analyzes the question in terms of whether the incentive compensation plan has "reduced expenses and created greater efficiencies in operations" and thus, it "can reasonably be expected to provide net benefits to ratepayers." *Commonwealth Edison Company*, 2003 Ill. PUC LEXIS 311, *319. In that case, the Commission set out its consideration for allowance or disallowance of incentive compensation in utility rates:

> "Generally, the Commission has not been receptive to the concept of inclusion of incentive compensation plan in base rates. In those instances that we have allowed recovery of incentive compensation programs, utilities have demonstrated that the goals set forth for their incentive compensation plans reduced operating expenses and created greater efficiencies. . . . Staff[] [has] proposed adjustments [which] relate to earnings per share and shareholder value added goals. These goals seem to provide value to shareholders, not ratepayers and should be disallowed."
> 2003 Ill. PUC LEXIS 311, *319

Thus, incentive compensation "expenses should be recovered if the incentive compensation plan has 'reduced expenses and created greater efficiencies in operations' and thus, it 'can reasonably be expected to provide net benefits to ratepayers.'"

Commonwealth Edison Co., ICC Docket No. 05-0597, at 95, 2006 Ill. PUC LEXIS 43, *247-48 (Order, July 26, 2006).

The Utilities' rejoinder (Br. p. 23) is that employee salaries are operating expenses and are recoverable in full as long as they are reasonably and prudently incurred, citing *Villages of Milford v. Illinois Commerce Commission*, 20 Ill. 2d 556, 565 (1960). The case cited, however, did not address unique situations involving incentive compensation. In fact, the law is clear that not all instances where utilities expend costs in compensating employees (for example free membership in clubs) are those costs recoverable. *Illinois Bell Telephone Company v. Illinois Commerce Commission*, 55 Ill. 2d 461, 480-81 (1973). The Supreme Court recognizes that not all utility expenditures are operation expenses which are "cognizable for the purpose of ratemaking." *Id*. at 481.

Clearly, while non-regulated companies may properly expend funds for an array of costs, subject only to recovery of their costs in their product sales, regulated utilities have always been held to a higher standard. The *Illinois Bell* court concluded that ratepayers are not required to pay any part of costs unless the utility shows that such costs directly benefit either ratepayers or the services the utility renders. *Illinois Bell Telephone Company, supra,* 55 Ill. 2d at 482-83. Thus, the *Illinois Bell* court disallowed proposed expenditures relating to lobbying because utility customers were not given an opportunity either to advocate or decide which legislative proposals should be supported. That court also disallowed certain charitable expenditures as constituting an involuntary assessment on the utility's patrons. Finally, that court disallowed dues

payments made on behalf of Company executives in organizations other than Chambers of Commerce, trade associations and industry organizations.

The utility bears the burden of establishing net benefits accrue to ratepayers in order to prove that the recovery incentive compensation costs is just and reasonable. *Northern Illinois Gas Company*, ICC Docket No. 04-0779, 2005 Ill. PUC LEXIS 475, *109-110 (Order Sept. 20, 2005). Thus, it is simply not the case that utility expenditures are considered just and reasonable in the absence of a proven benefit to ratepayers.

While incentive compensation programs, as a general category of costs, may be designed to attract a "sufficient, qualified, and motivated work force" (Utilities' Br. p. 24), this does not mean that such programs must be geared primarily toward benefitting shareholders in order to attract a viable work force. Certainly programs that are designed to incent utility personnel to benefit ratepayers in order to achieve additional financial goals can be as attractive to potential workers as programs which are geared towards benefitting shareholders. Further, the Utilities have made no showing that incentive programs must be designed to benefit shareholders in order to be effective in luring a competent workforce. In seeking to overturn such an order, the party appealing the Commission's decision has the burden of proof on all issues. 220 ILCS 5/10-201(d).

The Utilities (Br. p. 24) argue that their evidence of the prudence and reasonableness of their proposed incentive compensation costs was uncontradicted. However Staff witness Pearce clearly rebutted the recoverability of these costs, testifying that all of the plans were largely dependent upon financial goals of the

Companies that benefit shareholders but not ratepayers, that in the future the goals in the Plans may not be met and thus the Companies would incur no cost (*i.e.*, the payment of future awards is discretionary, but the costs would be recovered in rates regardless), and that prior Commission orders support the disallowance of incentive compensation in these circumstances (R. Vol. 53, C12466 – C12467, citing R. Vol. 44, C10308). GCI witness Effron also rebutted Utility witness Hoover's testimony regarding the recoverability of incentive compensation, testifying that, while Mr. Hoover's rebuttal testimony provides a description of the incentive compensation program, he has not demonstrated that the incentive compensation plan has reduced expenses and created greater efficiencies in operations. R. Vol. 52, C C12366-12367.

On cross-examination Mr. Ephron indicated that, in order to determine a compensation figure's recoverability in rates, at a minimum, inquiry must be made concerning what utility employees are being "incentivized" to do, as there might be some incentive rewards to utility employees for achieving goals that were not necessarily in the best interest of ratepayers (R. Vol. 96, Tr. 1199).

The Utilities (Br. p. 24) also argue that the Commission did not make a finding that the costs disallowed were imprudently or unreasonably incurred. There is no requirement for the Commission to make a finding of imprudence or unreasonableness. No part of the discussion in *Illinois Bell Telephone Company*, *supra*, 55 Ill. 2d at 482-83 indicates that the Commission is required to make a specific finding that costs are unreasonable or imprudent in order to support a disallowance by the Commission. The Utilities cite no persuasive authority for the proposition that the Commission's settled

approach to incentive compensation requires a finding of imprudence or unreasonableness.

The Utilities (Br. pp. 24-25) also imply that the Commission ignored uncontroverted evidence. The Commission, of course did no such thing. The Commission specifically noted that it had considered the entire record (Order p. 316; R. Vol. 86, C20945). The Utilities' real complaint is with the standard employed by the Commission and not with the Commission's weighing of the evidence. The issue is whether the Utilities met their burden of proving that the particular incentive programs offered are designed primarily to result in 'reduced expenses and create[] greater efficiencies in operations' and thus, 'can reasonably be expected to provide net benefits to ratepayers.'" *Commonwealth Edison Co.*, ICC Docket No. 05-0597, at 95, 2006 Ill. PUC LEXIS 43, *247-48 (Order, July 26, 2006). The programs in question have incentives largely dependent upon financial goals of the Utilities that benefit shareholders but not ratepayers. Without proving the programs are designed to benefit ratepayers in the manner required by the Commission's standard for recovery, the Utilities fail to meet the recoverability standard of *Illinois Bell Telephone Company, supra*, 55 Ill. 2d at 480-81.

The Utilities (Br. p. 25) also attack the legal basis for the Commission requiring them to demonstrate that part of the legal standard for recovering costs from ratepayers is that the utility demonstrate that the costs sought to be recovered are incurred to benefit ratepayers. Once again, the *Illinois Bell* court was clear that proving benefit to ratepayers is an essential criteria in justifying recoverability of a cost. Moreover, the fact the Commission does not cite a specific "legal basis" for requiring incurred costs to

be for the benefit of ratepayers (Br. p. 25) is unremarkable. In its Order, the Commission has provided the reviewing court with sufficient findings and analysis to support its conclusions and allow for informed judicial review. This is all that is required under the Act. *See Lefton Iron & Metal Company v. Illinois Commerce Commission*, 174 Ill. App. 3d 1049 (1st Dist. 1988); *Knox Motor Service, Inc. v. Illinois Commerce Commission*, 77 Ill. App. 3d 590 (4th Dist. 1979).

The Utilities' citation (Br. p. 26) to *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill.2d 111, 121-23 (1995) is misplaced. That decision makes it clear that the coal tar clean-up expenses were recoverable as mandated under federal law just like income taxes. Thus, the instant disallowed costs arise from discretionary programs meant to benefit shareholders under the guise of attracting an adequate workforce.

The Utilities (Br. p. 26) claim that no one challenged Mr. Hoover's conclusory testimony that the Utilities' incentive compensation plans in fact benefit ratepayers. The simple answer is that the Commission is not required to accept testimony at face value or to accept as true all evidence not rebutted. *City of Chicago v. Illinois Commerce Commission*, 15 Ill. 2d 11, 17 (1958). The fact of the matter is that there was no evidence whatsoever that it was necessary to restrict incentive compensation plans to those designed to benefit shareholders in order to attract and retain a motivated work force.

The Utilities (Br. p. 27) claim that attracting and retaining a sufficient, qualified, and motivated workforce improves productivity and quality of work and reduces expenses associated with recruiting and training new employees. They then leap to the conclusion that any and all incentive compensation programs, ostensibly as a group,

resulted in a lowering of maintenance expenses below target levels. Yet there is no indication that incenting management to increase benefits to shareholder caused the lowering of the operating costs.

In the end, the Utilities have failed to demonstrate that incenting employees to spend their time concentrating on providing shareholder benefits is necessary to attract and retain a motivated work force or that such devotion to shareholder benefits creates ratepayer benefits sufficient to allow cost recovery in the Utilities' rates.

C. The Record Supports The Commission's Downward Adjustment To The Utilities' Authorized Cost Of Capital To Recognize The Reduced Risk Afforded The Utilities Due To Rider VBA

As the Utilities state (Brief, p. 29), the Commission made two downward adjustments to the Utilities' cost of common equity in their capital structure. The first is to remove the higher risk related to the Utilities' nonutility affiliates. This adjustment is mandated by the Act and is not challenged by the Utilities. 220 ILCS 5/9-230. *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 283 Ill. App. 3d 188, 207 (2nd Dist., 1996). The second adjustment related to the granting of the new Rider VBA, which the Commission found reduces the operating risk of the Utilities (Order, pp. 99-100, R. Vol. 85, C20728-C20729).

This second adjustment is supported by the evidence of Staff Witness Sheena Kight-Garlisch (R. Vol. 45, C10429-C10441, Staff Ex. 6.0, pp. 15-27, esp. ll. 413-478; see also CUB-City Ex. 1.0 (Christopher C. Thomas), pp. 61-68, R. Vol. 44, C10172-C10179). The Utilities are attacking one item in a rather complicated series of studies and expert opinions concerning the appropriate cost of common equity, which are contained on pages 74-101 of the Commission Order (R. Vol. 85, C20703-C20730). *Archer-Daniels-Midland Co. v. Illinois Commerce Commission*, 184 Ill. 2d 391, 401-2

(1998) [in base rate proceedings, the Commission must consider all interactions and impacts on the revenue requirement]. The Utilities lay great stress on the Commission's determination of the unadjusted 10.38 cost of common equity, which is a composite (Utilities and Staff studies) and is not solely a Commission Staff number upon which Staff directly offered adjustments (Order, p. 100, top paragraph; R. 85, Vol. C20729). The Staff proposed its two adjustments to a much lower unadjusted cost of common equity (9.79) [Staff Ex. 6.0, p. 16, R. Vol. 45, C10430].

Although the Utilities talk about duplicative reductions, the first adjustment (for the greater risk arising from the Utilities' nonutility affiliates) does not include the second adjustment (for the lesser risk the Utilities with the new Rider VBA face). Certainly the Utilities' expert witness, Paul Moul, made no such duplicative adjustment claim (R. Vol. 49, C11457-C11480 (rebuttal) and Vol. 55, C13110-C13123 (surrebuttal)). Of course, since Rider VBA is a new matter, it has not been a consideration in the historical measurement of risk for these Utilities, unlike their relationship to nonutility affiliates.

The "double-count" claim as presented in the administrative record is based on the Utilities' claim that the lessened risk due to the new Rider VBA is captured by the "Utility Sample" used as a proxy to determine, in part, the cost of common equity (Utilities Ex. PRM-2.0, R. Vol. 49, C11480, ll. 473-483; C11491, ll. 736-739 and C11515-C11524). However, the Utility Sample was based on the same level of risk that the Utilities had without Rider VBA (Staff Ex. 6.0, pp. 22-26, R. Vol. 45, C10436-C10440 and Staff Ex. 18.0, p.6, R. Vol. 53, C12612). When the Commission itself tried to determine if the utilities in the Utility Sample had similar mechanisms to Rider

VBA (and therefore already accounted for revenues similar to Rider VBA in the calculation of the cost of common equity), the Commission was unable to do so, based on the evidence presented in the record (Order, pp. 97-98 and fn. 23, R. Vol. 85, C20726-C20727). It is the Utilities' burden to prove the reasonableness of the values it places on the components of the revenue requirement. 220 ILCS 5/9-201(c). *Citizens Utility Board v. Illinois Commerce Commission*, 276 Ill. App. 3d 730, 746 (1st Dist., 1996)

The Utilities do not challenge that the revenues generated by Rider VBA reduce the risk to the Utilities. Staff Witness Kight-Garlisch testified that, having a rider in place would reduce the operating risk of the Utilities (Staff Ex. 6.0, p. 23, R. Vol. 45, C10437), which the Utilities acknowledge is a part of investment risk. (North Shore Ex. PRM-1.13A, p. 1 of 3, R. Vol. 2, C00291; Peoples Gas Ex. PRM-1.13A, p. 1 of 3, R. Vol. 20, C04379). The Staff Witness testified that, with the existence of Rider VBA, the Utilities improved their business profile (and therefore their going-forward financial ratios) (R. Vol. 45, C10438-C10440). Determination of the cost of common equity is not a matter of formula but is a question of pragmatic business judgment to which the Commission's decision is entitled to great weight. *Village of Apple River v. Illinois Commerce Commission*, 18 Ill. 2d 518, 523 (1960). The Commission may not ignore pertinent factors, such as the existence of Rider VBA, that affect the rate structure. *Iowa-Illinois Gas & Electric Co. v. Illinois Commerce Commission*, 19 Ill. 2d 436, 442 (1960). *Cf. Public Service Co. of Northern Illinois v. Illinois Commerce Commission*, 5 Ill. 2d 195, 208 (1955) [uncertainties in forecasting is not a basis for the Commission to refuse to set the just and reasonable rates].

The Commission's decision is reasonable and is supported by substantial evidence. There is no double adjustment. The Commission order should be affirmed.

D. The Utilities May Not Get A Return On Ratepayer-Supplied Funds

The Utilities seek as an addition to their rate bases either the so-called "pension asset" or the test year payment of pension plan contributions. Both claims suffer from the same defect and must be denied on the facts of the present case. For how the pension asset arises, *see GTE North, Inc., infra,* 1994 Ill. PUC LEXIS 436, *16-*17 and *NIGAS, infra,* 1996 Ill. PUC LEXIS 204, *20. Comm. App., p. A39 and p. A43.

Under Illinois law, for ratemaking purposes, a public utility may not receive a return on investment from ratepayers for ratepayer-supplied funds. *City of Alton v. Illinois Commerce Commission,* 19 Ill. 2d 76, 85-6 and 91 (1960); *DuPage Utility Co. v. Illinois Commerce Commission,* 47 Ill. 2d 550, 554 and 558 (1971); and *Central Illinois Light Co. v. Illinois Commerce Commission,* 252 Ill. App. 3d 577, 583-3 (3rd Dist., 1993). *See also Business and Professional People for the Public Interest v. Illinois Commerce Commission ("BPI II"),* 146 Ill. 2d 175, 258 (1991). In the present case, the Utilities through their rates collected more money for their Other Post Employment Benefits (OPEBs) than the Utilities expensed in the test year. Staff Witness Bonita A. Pearce and GCI witness David J. Effron testified that these amounts constituted customer-supplied revenues, *i.e.,* paid by customers through their rates, which constitute a source of cost-free capital to the Utilities which should be recognized as a reduction from rate base in the Utilities' revenue requirement. Staff Ex. 14.0, R. Vol. 53, C12483-C12487, esp. lines 470-484, and GCI Ex. 1.0, R. Vol. 48, C11146-C11147. Neither witness was cross-examined concerning this adjustment. The Commission accepted this evidence (Order, p. 36; R. Vol. 85 C20665), and the

Commission is the expert judge of the credibility of the witnesses and the weight to be given the evidence. *City of Chicago v. Illinois Commerce Commission,* 15 Ill. 2d 11, 16 (1958) and *Lefton Iron & Metal Co. v. Illinois Commerce Commission,* 174 Ill. App. 3d 1049, 1060 (1st Dist., 1988).

The Commission has consistently rejected the attempts of utilities to get a return on these ratepayer-supplied funds whether OPEB or more generally the pension asset. *Central Illinois Light Co. d/b/a AmerenCILCO, et al.,* Ill.C.C. Docket Nos. 06-0070, 06-0071, and 06-0072, (cons.), Order of November 21, 2006, pp. 27-28, Comm. App., pp. A50-A51; *Northern Illinois Gas Company d/b/a Nicor Gas Company*, Ill.C.C. Docket No. 04-0779, Order of September 20, 2005, p. 26, 2005 Ill. PUC LEXIS 475, *56-*58, 245 P.U.R.4th 194, --, Comm. App., pp. A52-A53; *Northern Illinois Gas Co. ("Nigas"),* Ill.C.C. Docket No. 95-0219, Order of April 3, 1996, pp. 9-10, 1996 Ill. PUC LEXIS 204, *19-*23, Comm. App., pp. A43-A44, *affd. sub nom. Nigas, et al. v. Illinois Commerce Commission,* Order of June 23, 1997, Appeal Nos. 3-96-0473, etc. (cons.); and *GTE North Inc.*, Ill.C.C. Docket Nos. 93-0301 and 94-0041 (cons.), Order of October 11, 1994, pp. 8-13, 1994 Ill. PUC LEXIS 436, *16-*26, Comm. App., pp. A 39-A42, *affd. sub nom. Citizens Utility Board, et al. v. Illinois Commerce Commission,* Order of July 12, 1995, Appellate Court Docket Nos. 4-94-1103, 4-94-1104 and 4-94-1122 (cons.), *cert den*. December 6, 1995, Sup. Ct. Docket No. 79931, Petition of GTE North. *See also Citizens Utility Board v. Illinois Commerce Commission,* 166 Ill. 2d 111, 132 (1995) [Commission is unauthorized to depart drastically from practices established in earlier orders] and *Mississippi River Fuel Corp. v. Illinois Commerce*

Commission, 1 Ill. 2d 509, 514 (1953) [long-term consistent actions by the Commission can constitute a binding statutory construction].

The Utilities cite to the Commission decision in *Central Illinois Light Co. (CILCO)*, Ill.C.C. Docket No. 94-0040, Order of December 12, 1994, 1994 Ill. PUC Lexis 577, 158 PUR 4th 1, a decision whose application was rejected as "providing no guidance... Order itself was silent on the issue" by the Commission in the 1996 *Nigas* decision, *supra*, 1996 Ill. PUC LEXIS 204, *22, Comm. App., p. A44. In the absence of any finding as to the factual basis for allowing the ratebasing of the "prepaid" pension asset in the 1994 *CILCO* decision, the case has no persuasive value. *Governor's Office of Consumer Services ("GOCS") v. Illinois Commerce Commission*, 242 Ill. App. 3d 172, 189 (1st Dist., 1993) (allowance of an item in the past does not bar later rejection upon investigation with case citation). In a more recent Commission decision, CILCO (now AmerenCILCO) was denied the rate basing of excess OPEB funds. *Central Illinois Light Co. d/b/a AmerenCILCO, et al.*, Docket Nos. 06-0070, 06-0071, and 06-0072, (cons.), Order of November 21, 2006, p. 27, Comm. App., p. A50. In any event, the Commission is not subject to *res judicata* and, therefore, is free to deal with each situation, regardless of how it may have dealt with the same situation in a previous proceeding. *Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill. 2d 509, 513 (1953). The 1994 *CILCO* decision does not have any controlling effect.

In more specific response to the Utilities' counterproposal, the proper accounting of an item does not have a preclusive effect in the recovery of the item in a rate case. *BPI II*, *supra*, 146 Ill. 2d at 246-7 (allowance of the recording of the deferred

charges does not guarantee rate recovery); *GOCS v. Illinois Commerce Commission, supra*, 242 Ill. App. 3d at 188-189 (Peoples' budget plan balances); and *Illinois Power Co. v. Illinois Commerce Commission*, 254 Ill. App. 3d 293, 301-2 (3rd Dist., 1994). The evidence accepted by the Commission does not support this counter-proposal (R. Vol. 53, C12485, ll. 486-502). *City of Chicago v. Illinois Commerce Commission,* 15 Ill. 2d 11, 16 (1970) [the Commission is not required to accept even unrebutted evidence]. The cash that was contributed to the pension plan was obtained from normal operating revenues collected from utility ratepayers and represent funds supplied by ratepayers. It should be noted that the Utilities' counterproposal is unrelated to any claim of these pension plan contributions as operating costs, *i.e.* the "C" in the classic ratemaking formula. *Citizens Utilities Co. v. Illinois Commerce Commission,* 124 Ill. 2d 195, 200-1 (1988). For recovery of pension costs as an operating expense, *see NIGas, supra,* 1996 Ill. PUC LEXIS 204, *52-*55, Comm. App. pp. A44-A45.

The Commission's decision concerning these pension issues is supported by evidence and is mandated by Illinois law. The Commission should be affirmed.

IV. RESPONSE TO MULTIUT

A. The Commission's Transportation Rate Design Is Reasonable and Is Supported by Evidence

The Utilities had sought to eliminate Rider FST (Full Standby Transportation) (Comm. Order, p. 272; R. Vol. 86, C20901). In response to the opposition to said elimination, the Utilities in surrebuttal proposed an Alternative Rider FST which contained the addition of conditions similar to conditions being added to Rider SST (Selective Standby Transportation) including, *inter alia*, mandatory storage injection and use of MDN (Maximum Daily Nominations) rather than MDQ (Maximum Daily

Quantity) to determine injection limits. (Surrebuttal of Thomas E. Zack, Utilities' Ex. TEZ-3.0, R. Vol. 56, C13229-13235, C13276-13283 (Alternative Rider FST), and C13284-13298 (amendments to existing Rider FST in legislative style).

The Commission Staff had supported both the mandatory storage injections for transportation customers under both the SST Rider and the Alternative FST Rider and the proposed MDN use. See Staff Ex. 24 (Reb. Test. of David Rearden), pp. 3-6, 11-12 and 14-15 (R. Vol. 58, C13792-C13804); Staff Initial Brief, pp. 249-250 and 252-254 (R. Vol. 70, C16930-C16935); and Staff Rebuttal Brief, pp. 103-106 (R. Vol. 74, C17874-C17877. *See also* Rearden Cross Exhibit No. 5, R. Vol. 99, Tab 26. The ALJs proposed that the Commission accept the mandatory storage injection requirement of the Utilities but reject any use of MDN (R. Vol. 75, C18182 and C18184).

Thereafter, two Transportation Customers negotiated with the Utilities, and two changes in the design of Rider FST were proposed. (Constellation New Energy-Gas Division LLC's (Constellation's) Brief on Exceptions, pp.3-4; R. Vol. 76, C18292-18293). First, the amount of mandatory storage injection for North Shore Gas Co. only, was reduced from 85% to 75% (Comm. Order, p. 273-4; R. Vol. 86, C20902-C20903). Staff did not oppose this change (R. Vol. 79, C19129 and C19130). Second, the use of MDN to determine injection limits during April through October (preheating) period was allowed (Comm. Order, p. 279; R. Vol. 86, C20908). Staff continued to support the use of MDN exclusively for FST (R. Vol. 79, C19129).

This second change had been a proposal made during the pendency of the case by Vanguard Energy Services, LLC (Vanguard), a transportation customer (Comm. Order, p. 277; R. Vol. 86, C20906 *compare with* R. Vol. 66, C15755 - 15756 and Vol.

75, C18183). NICOR Gas, the other large stand-alone gas utility in Northern Illinois already does something similar. Nicor tariff quoted on pp.4-5 of Vanguard's initial Commission brief (R. Vol. 66, C15757-C15758). *See also* Dr. Alan Rosenberg, a witness for both Constellation and Vanguard, testifying against the Utilities' proposed exclusive use of MDN (R. Vol. 99, Tab 28, pp. 15-18).

Multiut's appeal is in a peculiar position. Through its evidence, Multiut opposed the elimination of the Rider FST (Rebuttal Testimony of N. Draiman and R. Lavende, Multiut Ex. 2.0, pp. 2 and 4; R. Vol. 52, C12257-12259) **and** the imposition of any changed conditions (including any mandatory storage injection and the use of MDN) on any rider to which Multiut and its customers would have transferred (Testimony of N. Draiman and R. Lavende, Multiut Ex. 1.0, pp. 5-9; R. Vol. 43, C09832-09836; please note Multiut's witnesses had no expertise on rate design or cost allocation (*Id*., C09828). *See* Multiut's Initial Hearings Brief, pp. 5-9 (against any storage injection and the use of MDN); R. Vol. 64, C15329-15333. Yet Multiut has not raised any of these matters in its Application for Rehearing (R. Vol. 86, C21010 to -21013) or in its Appellate Brief. 220 ILCS 5/10-113(a), *Citizens Utility Board v. Illinois Commerce Commission,* 166 Ill. 2d 111, 136 (1995), and *Centreville Township v. Illinois Commerce Commission,* 5 Ill. 2d 72, 79 (1955) [failure to raise issue specifically in application for rehearing bars consideration by the Court].

Instead Multiut has attempted to convert the Commission's approval of the two changed conditions for Alternative Rider FST (from what the Utilities' originally sought and both of which are supported by the evidence noted above) as an approval of some vague nonunanimous settlement. Multiut's position is baseless for the

Commission has merely approved two changes to the design of the FST tariff, a matter which meets the necessary legal standard of reasonableness. *Antioch Milling Co. v. Public Service Co. of Northern Illinois*, 4 Ill. 2d 200, 210 (1954). Multiut's claims (Brief, pp. 6-7 and 16) that the two rate design changes are outside of the record or new to the case is belied by Multiut's evidence and argument on these conditions which had been proposed to be made applicable to transportation customers.

B. Multiut Has Failed To Preserve Any Right To Present Additional Evidence

Multiut (Brief at 10 and 15) argues, because of the timing of the submission of Alternative Rider FST, *i.e*. during surrebuttal, that it was prohibited from presenting testimony concerning the two changes to Alternative Rider FST.

There is a requirement in the Rules of Practice of the Commission, 83 Ill. Adm. Code 200.880(a), that the application for rehearing contain a brief statement of the proposed additional evidence and an explanation why the evidence was not previously adduced. 220 ILCS 5/10-101 [the Commission may adopt rules for its proceedings]. *Marathon Oil Co. v. Illinois Commerce Commission*, 52 Ill. App. 3d 368, 370 and 373-374 (dissent) (5th Dist., 1978) [proposed evidence supported by affidavit properly proffered in application for rehearing according to the majority]. See 83 Ill. Adm. Code 200.880, Comm. App., p. A54. Multiut made neither necessary statement in its Application for Rehearing and has failed to preserve any claim to present evidence on this matter (R. Vol. 86, C21010-C21012). As Multiut admits on pages 3 and 12 of its Brief, its Application for Rehearing fixed its sight on an investigation of the claimed "settlement agreement" between the Utilities and two of its transportation customers.

Multiut has failed to preserve any issue concerning the presentation of additional evidence. 220 ILCS 5/10-113(a), *Citizens Utility Board v. Illinois Commerce Commission,* 166 Ill. 2d 111, 136 (1995), and *Centreville Township v. Illinois Commerce Commission,* 5 Ill. 2d 72, 79 (1955) [failure to raise issue specifically in application for rehearing bars consideration by the Court]. Even in its appellate Brief, Multiut has failed to state what additional evidence it would present in this matter. Multiut's opposition to any changed condition from the prior FST tariff was clearly presented to the Commission. Multiut Ex. 1.0, pp.6-9; R. Vol. 43, C09833-C09836 and Multiut Ex. 2.0, p. 5; R. Vol. 52, C12260. Multiut apparently did not respond to Vanguard's proposal concerning partial use of MDN and MDQ, although Multiut had clearly expressed its opposition to the use of MDN (Multiut's Initial Hearings Brief, pp. 3-5 and 8-9; R. Vol. 64 , C15327-C15333).

Multiut had a clear opportunity to present whatever evidence it wanted on these rate design issues. Multiut has waived its right to present further evidence on mandatory storage injection and the use of MDN requirements.

C. The Commission Did Not Approve A Settlement Agreement

The Commission did not approve a settlement agreement. What happened here is not uncommon. The Utilities and adverse parties seek to eliminate conflicts and issues in pending cases. The Commission considered the record and found the proposed changes to be reasonable (Commission Order, p. 279; R. Vol. 86, C20908).

The mandatory storage injection requirement ("mandatory injection") and the use of MDN for FST transportation customers did not arise from any "settlement." They were inherent within the Utilities' proposed SST Rider and Alternative FST

Rider. Multiut fully briefed its opposition to both matters before the Commission (Multiut's Initial Hearings Brief, pp. 3-5 and 8-9; R. Vol. 64, C15327-15333; and Multiut's Brief on Exceptions, 1-4, Vol. 76, C18281-18284). Mandatory injection, but not the use of MDN, was proposed by the ALJs to be accepted by the Commission as presented in the Utilities' proposed FST Rider, that is, 70% for PGL and 85% for North Shore (R. Vol. 75, C18180-18184). The so-called "settlement" consists of reducing the North Shore requirement to 75% and adopting Vanguard's proposal concerning a partial use of MDN.

The lowering of North Shore's mandatory injection runs to the favor of the transportation customers and not the Utilities. The Utilities, having agreed with other competitive transporters to reduce the level of preheating season storage, are required to offer the same terms to all Transportation customers, including Multiut. Apparently Multiut has not used North Shore's storage [Multiut Ex. 1.0, p. 9, lns. 166-180 ; R. Vol. 43, C09836 *compare with* pp.6-7, lns. 122-131 "...storage does not *always* apply to Multiut"; *Id*., C09833-09834]. Since this change is a determent to the Utilities, only they can object. *Produce Terminal Corp. v. Illinois Commerce Commission*, 414 Ill. 582, 599 (1953) and *Institute of Shortening & Edible Oils, Inc. v. Illinois Commerce Commission*, 45 Ill. App. 3d 98, 103 (4th Dist., 1977).

Incidentally, Multiut and its customers benefit from the gas held in storage by the Utilities (Comm Order, p. 276, fn 51; R. Vol. 86, C20905, citing People's evidence, R. Vol. 51, C11973). See also Multiut Ex. 1.0, p. 6-7, lns. 127-129 ("...statement that Multiut can withdraw...from storage <u>does not *always* apply</u> to Multiut."); R. Vol. 51, C09833-09834. Multiut's customers purchase full standby service, by which the

Utilities are obligated to provide full service to Multiut's customers in case of any failure in the delivery to the Utilities of Multiut's needed gas (*Id*., C09830). Thus, some of the gas injected into the Utilities' storage field is likely to be used to meet this guarantee under FST (Staff Ex. 24, pp. 3-4; R. Vol. 58, C13792-13793). Thus, the gas in the storage field is not foreign to Multiut's (and its customers') choice of the FST tariff and its benefits thereunder (R. Vol. 93, Tr. 589-590 (Thomas Zack)).

Multiut enjoys no right to the continuance of the existing FST tariff. *Antioch Milling Co. v. Northern Illinois Pubic Service Co*., 4 Ill. 2d 200, 208 and 210 (1954) [businesses cannot object to the discontinuance of a preferential utility rate, and the only issue is the reasonableness of the new rate]. There is no claim that either of the two changes in rate design are unreasonable. In matters of rate design, deference to the Commission is especially appropriate. *Amax Zinc Co. v. Illinois Commerce Commission*, 124 Ill. App. 3d 4, 11-12 (5th Dist.,1984) [in rate design the matter is more of sound business judgment rather than one of legal formula]. Questions of preferable techniques in rate design are not within the scope of judicial review. *City of Chicago v. Illinois Commerce Commission,* 13 Ill. 2d 607, 618 (1958).

Unlike *BPI v. Illinois Commerce Commission ("BPI I")*, 136 Ill. 2d 192, 209 (1989), in which the utility, the Commission and IIEC attempted to settle all pending rate issues (costs, return, test year, establishment of rates, etc.), the Commission and its Staff (R. Vol. 79, C19129) did not enter into or approve a "settlement agreement" in this cause. The Commission adopted two changed conditions which had been proposed and were supported by the evidence. *BPI I, supra,* 136 Ill. 2d at 217 (matters within the Commission's authority and supported by the evidence can be considered). Despite

Multiut's strenuous attempt to the contrary, the settlement concerns in *BPI I*, *supra*, have no application to the present Commission decision.

The Court should affirm the Commission's order and reject the claims of Multiut.

CONCLUSION

For all the above reasons, the Commission Order of February 5, 2008, should be affirmed.

Respectfully submitted

_____

John P. Kelliher
James E. Weging
Special Assistant Attorneys General

Counsel for the Respondent
Illinois Commerce Commission

Office of General Counsel
Illinois Commerce Commission
160 N. La Salle St., Suite C-800
Chicago, Illinois 60601
312/793-2877
Fax 312/793-1556
JWEGING@ICC.ILLINOIS.GOV
JKELLIHE@ICC.ILINOIS.GOV

Docket Nos. 1-08-2055, 1-08-2056, 1-08-2189, 1-08-2304, 1-08-2451, 1-08-2452 and 1-08-2453 (cons.)

IN THE ILLINOIS APPELLATE COURT
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS *ex rel.* **LISA MADIGAN, ATTORNEY GENERAL OF STATE OF ILLINOIS, ET AL.** *Petitioners*	)	On Direct Appeal of Orders of the Illinois Commerce Commission
v.	)	
ILLINOIS COMMERCE COMMISSION, ET AL. *Respondents*	)	Ill.C.C. Docket Nos. 07-0241and 07-0242 (cons.)

CERTIFICATE OF COMPLIANCE

I, James E. Weging, Special Assistant Attorney General, counsel for the Respondent, Illinois Commerce Commission, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, this Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 50 pages.

Dated April 10, 2009

_____
JAMES E. WEGING

Docket Nos. 1-08-2055, 1-08-2056, 1-08-2189, 1-08-2304, 1-08-2451, 1-08-2452 and 1-08-2453 (cons.)

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NOTICE OF FILING

TO: Attached Service List

PLEASE TAKE NOTICE that I have, on this 10th day of April, 2009 A.D., filed with the Clerk of the Illinois Appellate Court for the First District, the Brief of the Respondent, Illinois Commerce Commission in the above captioned cases, three copies of which are hereby served upon you.

_____

JAMES E. WEGING
JOHN P. KELLIHER
Special Assistant Attorneys General

Counsel for the Respondent
Illinois Commerce Commission

Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877
Fax (312) 793-1556
JWEGING@ICC.ILLINOIS.GOV
JKELLIHE@ICC.ILLINOIS.GOV

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the attached Notice, together with three copies of the Brief referred to therein, have been served upon the parties to whom the Notice is directed by first class mail, proper postage prepaid, from Chicago, Illinois on the 10th day of April, 2009 A.D.

_____
JAMES E. WEGING